IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 909 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RANGITBHAI KANABHAI NAYAK & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR UM SHASTRI appointed by Legal Aid Committee for Appellants.
MR RC KODEKAR ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 15/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. A fifteen year old girl was subjected to gang rape and sexual abuse by the appellants (A-1 and A-2) and accused No.3, Pratapsingh, who has died before the charge is framed. A-1 and A-2 were, therefore, charged and tried by the learned Special & Additional Sessions Judge, Panchmahals at Godhra in Sessions Case (Atrocity) No. 13 of 1999 for commission of offences punishable under Sections 363, 376 and 114 of the Indian Penal Code ('IPC' for short) and also under Section 3 (1) (x) (xi) and (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'Atrocity Act' for short). At the end of the

trial, both A-1 and A-2 were found guilty of the offences with which they were charged and resultantly the learned trial Judge convicted them vide judgment and order dated 6.10.2001 and both of them were sentenced to suffer R.I. for ten years and fine of Rs.500/- i.d., S.I. for 15 days for the offence punishable under Section 376 of the IPC and also sentenced to suffer R.I. for one year and fine of Rs.250/- i.d. S.I. for 10 days for the offence punishable under Section 363 of the IPC. A-1 has been acquitted of the offence punishable under the Atrocity Act whereas A-2 has been convicted for the offence punishable under the Atrocity Act but no separate sentence is imposed on him.

2. Briefly stated, the prosecution case is as under:

2.1. The victim-prosecutrix, we would address in this judgment as 'X', on the day of the alleged incident i.e., 22.8.1998, at about 6 P.M. went to Public Hand Pump in her village Junarena, Taluka Shehara, District Panchmahals for washing her cloths. At that time, A-1, who was known to her, came near the hand pump and sprinkled some intoxicant upon her as a result of which she lost sense and followed him to the agricultural field where A-2 along with another accused, named Pratapsingh, were already present. X did not know both of them. As per the further case of the prosecution, she was severely beaten by all the three persons and she was forcibly taken in a farm house and forcibly ravished by all the three persons, one after the other. Thereafter A-1 went for purchasing some food articles which were given to her but she refused to eat the same and thrown them into

the water. As per further case of the persecution, all the three persons and X remained in the farm house for the whole night and on the next day in the morning when X tried to shriek loudly all the three persons gagged her and beaten her again. Thereafter all the three accused persons forcibly ravished her, against her will, one after the other. At about 1 O'clock at night, the maternal uncle of X, Kalubhai Dhulabhai and other relatives came there in search of her and saw them in the light of the torch and hence all the accused fled from the scene and the X was taken by her maternal uncle along with other relatives, to her house. The Investigating Officer has collected the shirt and footwear of A-1 along with the petticoat of X lying at the site of the offence which were taken by the maternal uncle of X and also collected jewellary worth Rs.100/- looted by

the accused.

2.2. A complaint in respect of the aforesaid incident for commission of offences punishable under Sections 363, 376 and 114 of the IPC and under section 3 (1) (x) (xi) and (xii) was lodged by the victim herself on 24.8.1998, against the accused, which came to be registered vide CR No.I-201 of 1998 at Shehara Police station, which is at Ex.19.

2.3. Pursuant to the registration of the FIR, investigation was put into motion. During the course of investigation, accused were arrested, panchnama of their person was prepared, birth certificate of X was procured, clothes of the accused as well as the victim X were also recovered by drawing panchnama and sent to FSL for chemical analysis, the victim and accused were sent for medical examination,

statements of the witnesses were recorded and obtained the FSL report as well as medical certificate showing injuries on X. As incriminating evidence was found against the accused persons, the investigating officer filed charge-sheet against the A-1 and A-2 in the Court of learned Chief Judicial Magistrate, Panchmahals at Godhra for commission of offences punishable under Sections 363, 376 and 114 of the IPC and also under section 3 (1) (x) (xi) and (xii) of the Atrocity Act. As accused No.3, Pratapsingh, had died by the time the charge-sheet was filed, charge-sheet was not filed against him.

2.4. As the offence under Section 376 of the IPC as well as the offence under the Atrocity Act were exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate committed the case to the Sessions

Court, Panchmahals at Godhra.

2.5. The learned Special and Additional Sessions Judge, to whom the case is made over for trial, framed charge against the accused for commission of the offences punishable under Sections 363, 376 and 114 of the IPC and under section 3 (1) (x) (xi) and (xii) of the Atrocity Act.

2.6. The charge was read over and explained to both the accused persons. As both the accused persons pleaded not guilty to the charge, they were put to trial and tried by the learned Special and Additional Sessions Judge, Panchmahals at Godhra in Sessions Case (Atrocity) No.13 of 1999.

2.7. To prove the culpability of the accused, the persecution has examined 13

witnesses and relied upon their oral testimony, details of which are given in paragraph 5 of the impugned judgment and order as under:

PW No	Ex. No.	Name	Status	Page No.
1	8	Prabhakar Ramubhai Bhatiya	Medical Officer	55
2	11	Bhanabhai Dhulabhai	Related witness of the seizer panchnama of the clothes of the victim	65
3	14	Dr. Geetaben Chaganbhai	Medical Officer	77
4	15	Dr. Kamleshkumar Kunwarjibhai	Medical Officer	81
5	18	Victim-prosecutrix X	Complainant	97
6	20	Rameshbhai Ganeshbhai	Panch witness of the offence place panchnama	113
7	22	Kalubhai Dhulabhai	Maternal uncle of the complainant	119
8	27	Dilipbhai Somabhai	Panch witness	135
9	29	Natwarbhai Nanabhai	Panch witness	141
10	30	Prabhatsing Amarsing	Panch witness of the seizer of the ornaments	143

PW No	Ex. No.	Name	Status	Page No.
11	32	Gordhanbhai Gokalbhai	Independent witness	149
12	34	Dahyabhai Dhulabhai	Father of the complainant	153
13	35	Himmatsinh Gamabhai Bariya	P.S.I.	157

2.8. In order to bring home the charge against the accused, the prosecution has also produced a number of documents like complaint, panchnama, FSL report, birth certificate of X, injury certificate, etc., and relied upon the contents of the same. The learned trial Judge has discussed all these documents in para 5 of the impugned judgment and order.

2.9. After recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required

under Section 313 of the Code of Criminal Procedure ('the Code' for short).

2.10. In their further statement, both the accused persons denied the case of the prosecution and reiterated that the victim being a member of the Scheduled Caste, with a view to extract money from the Government as per the Government resolution, has filed false case against them and they have been falsely implicated to obtain compensation from the Government.

2.11. On appreciation, evaluation, analysis and close scrutiny of th evidence adduced by the prosecution, the learned trial Judge came to the conclusion that X was at the relevant time less than 16 years of age and she was kidnapped by the accused persons from the lawful guardian, her father, with a view to

rape her and in furtherance of that object, A-1 sprinkled some intoxicant upon her and under the influence of the intoxicant she was taken to a remote place in a farm house where there was no traffic and ravished her one after the other, against her will. Therefore, complicity of the accused in commission of the offences has been proved. He, therefore, held both the accused guilty for commission of the respective offences and recorded order of conviction and sentence against them to which reference is made earlier in this judgment giving rise to instant appeal under Section 374 of the Code, filed by A-1 and A-2 from jail.

3. Mr. Uday M. Shastri, who has been appointed by legal Aid Committee, on behalf of the appellants, submitted that both the accused persons are innocent and they have

been falsely implicated. The learned trial Judge has not considered the said fact at all. He has also emphasized that looking to the medical certificate, X was consenting party and she was in affairs with A-1. Therefore, she, on her own will, accompanied A-1 to the field at a remote place and remained with the accused for one day and practically for two nights in the farm house and when her maternal uncle found them, she gave complaint at the persuation of her family members. Looking to her physical conditions, she was habituated to sexual intercourse in past also and, therefore, she was a consenting party. According to him, no reliable, trustworthy and unimpeachable evidence has been produced by the persecution to connect the accused with the commission of the offences. Therefore, according to him, since there is no evidence connecting the accused with the offences

alleged against them, the impugned judgment and order recording conviction and sentence against the accused, is bad in law and deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which they were charged. He, therefore, urged to allow the appeal.

In the alternative, he submitted that minimum sentence prescribed for the offence under Section 376 i.e., seven years, may be imposed on the accused instead of ten years imposed by the learned trial Judge.

4. Per contra, Mr. RC Kodekar, learned APP for the respondent – State of Gujarat, submitted that there is reliable, clinching and trustworthy evidence which unerringly proves that the accused have committed gang-

rape on a 15 year old girl. According to him, now-a-days offence of gang-rape and sexual abuse are on increase. He further submitted that the testimony of victim X, her maternal uncle and medical officers and FSL report are so clinching that they corroborate each other and they clearly establish that the accused have committed gang-rape on a 15 year old girl. The FSL report of the cloths of the victim and accused in terms unerringly discloses that there were marks of semen and medical evidence also suggests that her hymen was raptured and there was injury of CLW on her leg. Therefore, according to him, the prosecution has established the charge levelled against the accused for commission of offence of rape beyond reasonable doubt and looking to the age of the victim and the manner in which the gang rape was committed on X, no mercy can be shown to the accused and

the sentence of RI imposed on the accused by the learned trial Judge cannot be reduced on the facts and circumstances of the case and, according to him, no interference with the impugned judgment and order is called for and, therefore, he urged to dismiss the appeal.

5. This court has considered the submissions advanced by Mr. Uday M Shastri, learned advocate appointed by Legal Aid Committee, on behalf of the appellants and Mr. RC Kodekar, learned APP for the respondent – State of Gujarat, at length. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections.

6. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned trial Judge has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral testimony of the prosecutrix X.

7. Victim X has been examined by the prosecution as PW 5, at Ex.18 which is at page 97 of the appeal memo compilation. In her oral testimony, she has, inter alia, stated that she has studied upto 4th standard. The incident had taken place prior to three years of recording her statement when she had gone to the public hand pump for washing her cloth. At that time there was nobody at the hand pump and A-1 came there and sprinkled some intoxicant upon her and thereafter she could

not know anything and lost her sense. She thereafter started walking behind A-1. A-2 and another person (Pratapsingh) were with him. She did not know his name. All the three persons took her to agricultural field near a pond and they ravished her one after the other. She tried to shout but they gagged her. They had also beaten her and threatened to kill her. On the second day, at night her maternal uncle and other relatives came there who saw them in torch light. When her maternal uncle came there the accused persons fled from the scene and she embraced her maternal uncle. She has also stated before the court that all the three accused persons are known to her. She knows A-1 and A-2 by name but she does not know accused No.3 by name who has died. Thereafter she was taken to her house. She has also testified that her maternal uncle and her paternal uncle and other relatives

also came to the field to find her out. She lodged the complaint with Shehara Police Station which is on record at Ex.19. On a close look at Ex.19, according to this court, there is no contradiction at all in her oral statement before the Court and what she has stated in the complaint. She has stated similar version in the Court and in the complaint at Ex.19. It may be appreciated that she successfully withstood the test of cross-examination made by the learned advocates of the accused and nothing substantial has been brought out from her cross-examination which would impeach her credibility. She has also repelled the suggestion that she wanted to marry A-1 who refused to marry her and, therefore, she lodged a false complaint against him.

8. In order to get corroboration to the

evidence of X, the prosecution has relied upon the evidence of P.W.7, Kalubhai Dhulabhai, maternal uncle of the complainant, Ex.22, which is at page 119 of the appeal memo compilation. Kalubhai Dhulabhai has, inter alia, testified that the incident had taken place prior to three years. He has stated that his brother-in-law and his son came to his house on cycle and inquired about X. Thereafter he was informed by his brother-in-law, i.e., father of X, that X had gone to the public hand pump for washing cloths but she had not returned. Her cloths were lying near the hand pump. Thereafter he, along with other persons, went to the field in search of X. Her maternal uncle saw X along with one boy in a deep ditch in the torch light which he had in his hand. Thereafter that boy ran away. X, who was in an unconscious state, embraced her maternal uncle. Thereafter she was brought

to her house and inquired as to what had happened. X narrated the incident which she has narrated in her complaint as well as before the court in her oral testimony. Thereafter they all went to the police station and lodged the complaint. This witness was also subjected to cross-examination by the learned advocates for the accused. But nothing substantial has been brought out from his cross-examination which would be of any avail or assistance to the defense and his evidence has remained unimpeachable.

9. The prosecution has thereafter examined two doctors, P.W.3, Dr. Geetaben Chaganbhai Vaghela, Medial Officer, Ex.14, which is at page 77 of the appeal memo compilation and P.W.4, Dr. Kamleshkumar Kunwarjibhai, Medical Officer, Ex.15 which is at Ex.81 of the appeal memo compilation. Both the doctors have

supported the persecution case. Both of them have in their oral testimony stated that hymen of X was ruptured and there was injury of CLW on her leg. It may be appreciated that the evidence of both these witnesses has also remained unimpeachable.

10. To prove the age of X, the prosecution has examined P.W.11, Gordhanbhai Gokalbhai, independent witness, Ex.32, which is at page 149 of the appeal memo compilation. In his oral testimony, he has, inter alia, testified that he is serving for the last 15 years in Navareni Primary school and since December 1998 he is principal of the school. He brought the school register which is on record at Ex.33 and as per the school register, birth date of X is 31.5.1983. He has also testified that since X remained absent from 5th standard, her name is deleted from the

register. Therefore, it is duly proved that X is born on 31.5.1983 and the incident complained of had taken place on 22.8.1998 and, therefore, on the day of the incident, her age was about 15 years and three months and hence admittedly she was below the age of 16 years at the relevant time.

11. In view of the aforesaid evidence, according to this court, it is duly proved that X was less than 16 years of age on the day of the incident of rape and the oral testimony of victim X herself which is unimpeachable is sufficient to establish the charge of rape levelled against the accused. However, her oral testimony also gets corroboration from the evidence of P.W.7, Kalubhai Dhulabhai, her maternal uncle at Ex.22 who had seen the accused flee from the place of the incident. Besides this, the

evidence of the medical officers also corroborates the oral testimony of the victim X.

12. The contention that there is delay in lodging the FIR, therefore, the persecution case cannot be relied upon, has no substance.

In the case of State of Chhattisgarh v. Derha, (2004) 9 SCC 699, the Supreme Court has held that the mere factum of delay in filing complaint by itself is not fatal to prosecution case. In the case before the Supreme Court, the occurrence was on 6.3.1990 and the complaint was filed on 10.3.1990. The victim girl was of eight years. Her father was out of station on the date of occurrence. The Supreme Court has observed that there was possibility of hesitation on the part of the mother in lodging complaint. Thus, said delay

is explained and hence did not prove fatal and it was held in that case that the delay was not fatal to the prosecution case.

In the instant case, the incident took place on 22.8.1998 when she was forcibly taken by the accused and practically for one day and two nights she was under the captivity of the accused who, one after the other ravished her, against her will, and when her maternal uncle found her and brought her back to her house, immediately the complaint was lodged by the victim herself and, therefore, according to us, there is no delay in filing the FIR.

13. The contention that victim X was habituated to sexual intercourse in past and, therefore, her oral testimony cannot be relied upon, has also no substance.

In the case of State of UP v. Pappu (2005) 3 SCC 594, the Supreme Court has ruled that even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was, did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. Even if the mother of the prosecutrix has accepted that character of her daughter was not good, that does not dilute the offence. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse

to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. In this case the High Court's view that the girl being of loose morals and easy virtue the accused were entitled to acquittal is indefensible.

In the instant case, as per the prosecution case, three persons committed gang rape on the victim X and, therefore, even on demeanour if we take it for granted that she was habituated to sexual intercourse and she had affairs with A-1, in the case also A-1 would have never allowed anyone to have sexual intercourse with her and he would have protected her from others. In the instant case, it is clearly established that all the accused persons committed intercourse with her, against her will, one after the other, practically for a whole day and almost for two

nights.

14. It is also settled principle of law that conviction can be based on the oral testimony of the prosecutrix without insisting for corroboration if the same inspires confidence. In this regard it would be advantageous to refer to the decisions of the Supreme Court in the case of Kamalanantha v. State of Tamil Nadu, (2005) 5 SCC 194, State of MP v. Dayal Sahu, (2005) 8 SCC 122, State of UP v. Pappu (2005) 3 SCC 594 (supra). In the above referred to three judgments the Supreme Court has ruled that conviction can be based on the testimony of prosecutrix alone, without insisting for corroboration if the same inspires confidence.

In the instant case, at the cost of repetition, be it stated that the way and the

manner in which X was taken by A-1 from the public hand pump by sprinkling some intoxicant article on her to the field at a remote place and after administering threat to kill her and when she tried to shriek, the accused gagged her and all the three accused persons ravished her one after the other for one day and almost two nights, is unpardonable. It is a clear case of gang-rape. However, the learned trial Judge has not framed the charge of gang-rape against the accused.

15. On close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned trial Judge. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other

conclusion is possible except the one reached by the learned trial Judge on the facts and in the circumstances of the case.

16. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned trial Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasonings in our language or giving the same answers to the same criticism in our own words for the sake of form.

17. In aforesaid view of the matter, according to us, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and

sentence passed by the learned trial Judge.

18. The sentence awarded to the accused is RI for ten years for the offence under section 376 of the IPC. The minimum sentence prescribed for the offence under section 376 is seven years. In the instant case, the accused have committed the offence of gang rape and as per the provisions of Section 376 (2) Explanation 1, the minimum sentence is RI for ten years. Though the learned trial Judge has not framed the charge of gang rape against the accused, in fact the offence committed by the accused is gang-rape. Therefore, the sentence of RI for ten years imposed on the accused by the learned trial Judge cannot be interfered with and no leniency, by way of reduction of sentence, can be shown in the instant case.

19. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the learned trial Judge and hence the appeal lacks merit and deserves to be dismissed.

20. We, however, clarify that the sentence of RI for 10 years imposed on the accused for the offence under Section 376 of IPC and the sentience of RI one year imposed on them for the offence under Section 363 of IPC shall run concurrently.

21. It has been brought to the notice of this court by Mr. RC Kodekar, learned APP, that A-1 who was released on furlough for a period of 14 days in 2003, was to surrender on 15.11.2003 but he has not surrendered himself to jail authorities till now. The jail

authorities are, therefore, directed to trace him out, arrest him and bring him back to jail to serve out the remaining period of the sentence imposed on him by the learned trial Judge which has been confirmed by this Court in this judgment.

22. For the foregoing reasons and with the aforesaid clarification and direction, this appeal is dismissed.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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